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Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

-and-

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS FOR PETITIONER INTERTANKO

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QUESTIONS PRESENTED

1. Whether federal statutes, regulations and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications and manning expressly or impliedly preempt attempts by an agency of the State of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.

2. Whether an individual state may deny entry to, or penalize for non-compliance with state safety and environmental protection regulations, a vessel that has been found by the vessel's nation of registry and the United States Government to be eligible to enter the United States under multilateral treaty commitments, federal law, and federal regulations governing safety and environmental protection.

RULE 29.6 STATEMENT

The International Association of Independent Tanker Owners ("Intertanko"), is a trade association whose members are the owners or operators of U.S. and foreign tank vessels. Intertanko is organized as a non-profit entity under the laws of Norway. It issues no shares of ownership.

STATEMENT OF THE PARTIES

Intertanko was complainant in an action seeking a declaratory judgment and injunctive relief from the United States District Court for the Western District of Washington. Intertanko's complaint challenged on constitutional grounds tank vessel regulations promulgated by the State of Washington. Intertanko appealed an adverse decision by the District Court to the United States Court of Appeals for the Ninth Circuit. The United States of America intervened as a party Appellant in this matter before the Court of Appeals and was granted intervenor status on June 6, 1997. Intertanko and the United States separately petitioned this Court to issue a writ of certiorari to the Court of Appeals. Both petitions were granted on September 10, 1999, and were consolidated by the Court for briefing and argument on the merits.

The Respondents are officials of the State of Washington responsible for enforcing the challenged State tank vessel regulations. Respondent-Intervenors are organizations who intervened in support of the State at the district court level and who participated in briefing and argument at the appellate level.

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OPINIONS BELOW

The order and amended opinion of the Court of Appeals, *International Ass'n of Independent Tanker Owners v. Locke*, Docket No. 97-35010, is reported at 148 F.3d 1053. (Pet. App. A.)[1] The order of the Court of Appeals denying rehearing and rehearing *en banc*, including the dissenting opinion of Judge Graber, is reported at 159 F.3d 1220. (Pet. App. C.) The opinion of the district court granting summary judgment against petitioner Intertanko and denying Intertanko's motion for summary judgment, *International Ass'n of Independent Tanker Owners v. Lowry*, Docket No. C95-1096C, is reported at 947 F. Supp. 1484. (Pet. App. B.)

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on June 18, 1998, and amended that order on August 31, 1998. (Pet. App. A.) Rehearing and suggestion for rehearing *en banc* were denied on November 24, 1998. (Pet. App. C.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).[2]

STATUTORY PROVISIONS INVOLVED

Intertanko relies primarily on the Supremacy Clause and the Treaty Clause of the United States Constitution, and the federal Ports and Waterways Safety Act of 1972, as amended by the Ports and Tanker Safety Act of 1978, and the Oil Pollution Act of 1990 (Title 46, United States Code, Subtitle II).

Article VI, Clause 2 of the Constitution of the United States reads:

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1. All references to "Pet. App." are to the Appendix submitted by Intertanko with Intertanko's Petition for Writ of Certiorari.

2. The United States of America sought and received two extensions of time in which to file a petition for a writ of certiorari in this matter. In each instance, petitioner Intertanko filed conforming requests. On February 17, 1999, Justice O'Connor granted an extension of thirty days to and including March 24, 1999. On March 15, 1999, Justice O'Connor granted an extension to and including April 23, 1999.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Pet. App. D at 91a.)

The Treaty Clause states that the President of the United States: ". . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." (Pet. App. D at 91a.)

The Ports and Waterways Safety Act, in pertinent part, requires the Secretary of the United States Department of Transportation to issue regulations with respect to designated subject matters concerning tank vessels:

> § 3703 Regulations
>
> (a) The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. . . . Regulations prescribed under this subsection shall include requirements about —
>
> (1) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;
>
> (2) the handling or stowage of cargo, the manner of handling or stowage of cargo, and the machinery and

> appliances used in the handling or stowage;
>
> (3) equipment and appliances for life-saving, fire protection, and prevention and mitigation of damage to the marine environment;
>
> (4) the manning of vessels and the duties, qualifications, and training of the officers and crew;
>
> (5) improvements in vessel maneuvering and stopping ability and other features that reduce the possibility of marine casualties;
>
> (6) the reduction of cargo loss if a marine casualty occurs
>
> (7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity. . . .

46 U.S.C. § 3703(a); (Pet. App. E at 197a-198a.)

The United States Coast Guard has promulgated federal regulations that impose requirements and standards on U.S. and foreign tank vessels pursuant to Titles 33 and 46 of the United States Code.[3] In 1995 the State of Washington's Office

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3. The relevant subchapters in Title 33 of the Code of Federal Regulations are: Subchapter A, General Provisions (33 C.F.R. Parts 1-27); Subchapter D, International Navigation Rules (33 C.F.R. Parts 80-82); Subchapter E, Inland Navigation Rules (33. C.F.R. Parts 84-96); Subchapter I, Anchorages (33 C.F.R. Parts 109-110); Subchapter L, Waterfront Facilities (33 C.F.R. Parts 125-128); Subchapter O, Pollution (33 C.F.R. Parts 151-159); and Subchapter P, Ports and Waterways Safety (33 C.F.R. Parts 160-168).

The relevant subchapters in Title 46 of the Code of Federal Regulations are: Subchapter A, Procedures Applicable to the Public (46 C.F.R. Parts 1-9); Subchapter B, Merchant Marine Officers and (Cont'd)

of Marine Safety promulgated as final rules Best Achievable Protection ("BAP") regulations governing tank vessel design, construction, operation, manning and personnel qualifications pursuant to Chapter 88.46 of the Laws of the State of Washington. These regulations are published at sections 317-21-010 *et seq.* of the Washington Administrative Code ("WAC"). (Pet. App. J.) A table setting forth the coincidence between the subject matters of the challenged Washington State regulations and federal regulations, statutes and treaties was provided the Court in the Appendix to Intertanko's Petition. (Pet. App. K, 349a-353a.)

All other statutes and international agreements relied on or at issue have been or will be provided to the Court in appendices submitted by the parties.

STATEMENT OF THE CASE

A. Background

In 1989, the governments of the states of Washington, Oregon, Alaska, California, and Province of British Columbia formed the "States/British Columbia Task Force" for the purpose of coordinating activities relating to oil spills. In

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(Cont'd)
Seamen (46 C.F.R. Parts 10-16); Subchapter D, Tank Vessels (46 C.F.R. Parts 30-39); Subchapter E, Load Lines (46 C.F.R. Parts 41-47); Subchapter F, Marine Engineering (46 C.F.R. Parts 50-64); Subchapter G, Documentation and Measurement of Vessels (46 C.F.R. Parts 66-69); Subchapter I, Cargo and Miscellaneous Vessels (46 C.F.R. Parts 90-105); Subchapter J, Electrical Engineering (46 C.F.R. Parts 110-113); Subchapter N, Dangerous Cargoes (46 C.F.R. Parts 140-155); Subchapter Q, Equipment, Construction, and Materials: Specifications and Approval (46 C.F.R. Parts 159-165); Subchapter S, Subdivision and Stability (46 C.F.R. parts 170-174); Subchapter V, Marine Occupational Safety and Health Standards (46 C.F.R. Parts 197-198); and Subchapter W, Lifesaving Appliances and Arrangements (46 C.F.R. Part 199).

The Coast Guard regulations also accommodate differing conditions in various localities. *See* Reply Brief of Appellant Intertanko at 7, 11-12, and nn.2, 4-13.

July 1990, the Task Force issued draft recommendations for legislation and regulations that individual state and provincial state governments were encouraged to adopt. They included state requirements for accident reporting, navigation and towing equipment, seafarer training, substance abuse testing, manning and personnel standards, and vessel prevention plans. The Task Force issued its final recommendations in October 1990. (JA-73, excerpts of Final Report.)

On May 21, 1991, the Governor of Washington signed legislation that is codified at Chapter 88.46 of the Revised Code of Washington ("R.C.W."). R.C.W. ch. 88.46. The statute requires tanker owners and operators to file oil spill prevention and response plans with the State and authorizes penalties for violators. *See* R.C.W §§ 88.46.070. .080, and .090. Shortly thereafter, the newly-formed Washington State Office of Marine Safety ("OMS") issued Interim rules pursuant to R.C.W. § 88.46 requiring vessel operators to submit proprietary company operating manuals. OMS initiated a rulemaking proceeding to create permanent vessel and crew requirements that, using the Task Force recommendations and the internal company manuals as starting points, were promulgated as the contested Best Achievable Protection ("BAP") regulations. (Pet. App. J at 307a-345a.) Issued on December 9, 1994, the BAP regulations impose requirements for tank vessel design, construction, operation, manning and personnel qualifications for tank vessels entering Washington State waters. The State applied the BAP regulations to all tank vessels entering Washington State waters, including those merely transiting to other jurisdictions such as Oregon and Canada. The final regulations became effective in July, 1995.

B. Procedural History

The particular focus of this proceeding is a Court of Appeals decision from the Ninth Circuit that largely rejected assertions by Intertanko and intervenor below, the United States of America, that comprehensive federal standards

addressing tank vessel design, equipment, operations, personnel qualifications, training and manning preempt the State of Washington ("the State") from imposing regulations that propound divergent standards governing the same objects and subject matters.

Intertanko is an international trade association whose 280 members own or operate more than 2,000 tankers of U.S. and foreign registry. Some of these tankers call at ports in Washington State or transit through Washington State waters en route to destinations in other jurisdictions of the United States or Canada. (JA-25 to JA-28 and JA-30 to JA-33.)

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331(a) and 1337(a), as these issues are a matter of federal question and concerned issues regulating commerce. On July 17, 1995, shortly after the BAP regulations became effective, Intertanko filed a complaint seeking injunctive relief and a declaratory judgment in the United States District Court for the Western District of Washington ("district court"). Specifically, Intertanko challenged sixteen of the BAP regulations. These regulations, in summary form, impose the following requirements on tank vessels, their owners, and their crews: submission of a detailed summary of any past (within five years) or future "events" involving the vessel (WAC 317-21-130); watch manning requirements for navigation, pilotage, security, anchor, and engineering watches throughout the vessel owner's fleet (WAC 317-21-200 Watch Practice Operating Procedures); navigational procedures while underway, preparation of detailed voyage plans, and navigation equipment check intervals (WAC 317-21-205 Navigation Operating Procedures); inspection intervals for engineering equipment and additional operational requirements (WAC 317-21-210 Engineering Operating Procedures); requirements for pre-arrival tests and inspections of all engineering, navigation, and propulsion systems aboard the

vessel (WAC 317-21-215 Operating Procedures — Pre-arrival tests & inspections); operating procedures for various shipboard emergencies (WAC 317-21-220 Emergency Operating Procedures); state control over vessel records for "events" in state waters (WAC 317-21-225 Record Retention Requirements); additional training qualifications beyond those required for obtaining a license or merchant marine document (WAC 317-21-230 Personnel training and qualifications); random, pre-employment, and post-accident drug and alcohol testing (WAC 317-21-235 Personnel policies — illicit drug and alcohol use); personnel performance review for any crew member serving on vessel in excess of six months (WAC 317-21-240 Personnel evaluations); work hour limitations and rest requirements (WAC 317-21-245 Personnel policies — work hours); common language and English language proficiency requirements for officers and crews (WAC 317-21-250 Personnel policies — language); maintaining crew training records on board the vessel (WAC 317-21-255 Personnel policies — record keeping); establishment of detailed inspection and safety programs (WAC 317-21-260 Management); installation of additional navigation equipment and bow and stern emergency towing systems on all tankers (WAC 317-21-265 Vessel Technology)[4]; submission of advance notice of vessel entry and safety reports regarding vessel operations (WAC 317-21-540). (JA-7, No. 106, filed 6/3/96, Intertanko's Memorandum in Support of Motion for Summary Judgment, at pp. 4-5.)

Intertanko's complaint alleged that a pervasive federal presence in all subject matters covered by the State's BAP regulations compelled a disposition invalidating the BAP regulations. Relying on the Supremacy Clause, the Commerce Clause and federal powers in the domain of

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4. These equipment requirements were deemed by the Court of Appeals to be invalid under this Court's decision of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). (*See* Pet .App. A at 29a-32a.)

foreign affairs, Intertanko sought a declaration that the BAPs were unlawful and unenforceable against vessels operating in interstate and international commerce, and argued that their enforcement should be enjoined. (JA-2, filed 7/1/97, Brief for Appellant Intertanko at 5-6.) Additionally, Intertanko argued that the BAP regulations created constitutionally impermissible conflicts with international obligations of the United States, particularly given the considerable degree to which federal vessel and crew standards arise from or implement international agreements. (JA-2, filed 7/1/97, Brief for Appellant Intertanko at 65-67.) Intertanko cited express statements by the United States Coast Guard as evidence of federal preemptive intent and urged the district court to find both express and implied (field and conflict) preemption by federal authority as a basis for invalidating the BAP regulations. Finally, Intertanko contended that, because the State regulations necessarily required shipowners, crews and vessels outside the State of Washington and the United States to comply with their requirements in order to qualify for eventual admission to Washington waters, they resulted in an impermissible extraterritorial application of State power.

After oral argument on cross-motions for summary judgment, the district court concluded that all challenged state regulations were constitutionally valid, that no condition of field preemption existed with respect to any of the regulations, that the BAP regulations did not violate the Commerce Clause or impinge on the foreign affairs powers of the national government, and that the State was not unlawfully projecting its authority extraterritorially. The district court also concluded that express preemptive statements of the United States Coast Guard regulations were beyond the statutory authority of the Coast Guard. (Pet. App. B at 61a-63a.)

Intertanko filed a Notice of Appeal from the district court's decision with the Court of Appeals for the Ninth

Circuit. The United States of America intervened in support of Intertanko's position that BAP regulations were generally incompatible with federal requirements and international commitments. The Court of Appeals issued an Order on June 18, 1998, affirming in part and reversing in part. An amended opinion issued on August 31, 1998. The Court of Appeals found that WAC section 317-21-265, requiring certain navigation equipment and specialized towing equipment, was "virtually indistinguishable" from similar state requirements invalidated by this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. at 151, 160-61 (1978) (also referred to herein as "*Ray v. ARCO*" or "*Ray*"). (Pet. App. A at 30a-31a.) With regard to the remainder of the state regulations, however, the Court of Appeals held that the BAP regulations were not preempted either by this Court's analysis in *Ray*, or by regulations implemented by the Coast Guard. (Pet. App. A at 29a, 32a-38a.)

The Court of Appeals relied substantially on its view that section 1018 of the Oil Pollution Act of 1990 ("OPA 90" or "OPA") (33 U.S.C. § 2718) had significant non-preemptive effect that freed the states to engage in direct regulation of "operational" vessel activity. (Pet. App. A. at 23a and 27a-29a.) The Court deemed OPA section 1018 to be a reliable indicator that Congress intended to permit state regulation of tank vessels. The court further determined that OPA section 1018 rendered express preemptive statements by the Coast Guard in issuing regulations under federal vessel safety and marine environmental protection statutes beyond the "scope of [the Coast Guard's] congressionally delegated authority," citing this Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). (Pet. App. A at 33a-34a.) The Court stated that section 1018 "demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." (Pet. App. A at 22a.). The Court of Appeals found that OPA 90, "as the most recent statute in the field," and its

section 1018 savings provision reflect " 'the *full* purposes and objectives of Congress' " better than other federal statutes relied on by Intertanko and the United States. (Pet. App. A at 21a, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).)

The Court of Appeals dismissed concerns of Intertanko and the United States that unilateral state deviations from federal and international standards undermined the foreign affairs role of the national government and the substantive content of the international agreements. In so doing, the Court of Appeals invoked its 1984 decision in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), where it found that " 'international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.' " (Pet. App. A at 23a.) The court also declined to consider arguments advanced by the United States that the State regulations further conflicted impermissibly with "innocent passage" elements of United Nations Convention on Law of the Sea ("UNCLOS") and the U.S./Canada Bilateral Agreement on the grounds that these issues were being raised for the first time on appeal. (Pet. App. A at 24a-25a.)[5]

Finally, the strong reliance of Intertanko on this Court's rationale of *Ray*, as compelling a field preemption conclusion invalidating Washington State rules that address federally-regulated elements of vessel "operations," "personnel qualifications," "training," and "manning" was rejected on the basis that *Ray*'s invalidation Washington State design, construction and equipment requirements was confined to design, equipment and construction and did not extend to

5. In seeking rehearing *en banc*, both Intertanko and the United States noted that these arguments had been raised by Intertanko in the district court action and were, in any event, cognizable by the Court of Appeals. (JA-5, No. 1, filed 7/17/95, Complaint at 3, 10-13 and 16-21.)

other elements (*e.g.*, operations, personnel qualifications, training, and manning) of Title II of the Port and Waterways Safety Act ("PWSA"). (Pet. App. A at 27a-28a, and n.11.) Washington State requirements were deemed by the Court of Appeals to be "operational" in nature and not subject to the reasoning of this Court's rejection of State design and construction and equipment requirements preempted under *Ray*.

Intertanko and the United States petitioned for rehearing and rehearing *en banc*. The Court of Appeals denied these requests on November 24, 1998. (Pet. App. C, Graber, J., dissenting). Intertanko and the United States filed Petitions for Certiorari to this Court on April 23, 1999. The Court granted those Petitions in an Order issued on September 10, 1999. The two petitions were consolidated for briefing and argument.

SUMMARY OF ARGUMENT

Marine safety and environmental protection are matters of explicit, traditional national concern. The Congress of the United States, acting pursuant to clear enumerated powers placed in its charge by the Constitution, actively has asserted for more than a century its authority to promulgate safety and environmental standards and requirements for vessels operating in the Nation's interstate and foreign commerce. The Congress directly regulates vessels as instrumentalities of interstate and international commerce. Congress has expressed its intent that vessel safety and marine environmental protection measures be uniform both in national and international contexts. The resulting federal regulatory structure is comprehensive, pervasive, and technically complex. The Congress has never indicated, either expressly or by implication, that it contemplates a joint or concurrent role for states and local governments in matters relating to standards and requirements affecting the on-board, primary conduct of tank vessels or their crews.

An extensive array of international agreements that address vessel safety and marine environmental protection issues complement the comprehensive federal maritime regulatory scheme. The United States is a party to many of these international agreements and has been a leader in advocating international adoption of strict safety requirements for vessels worldwide. Neither the Congress nor the Executive Branch of the national government has expressed qualifications or reservations to international treaties governing vessel safety and marine environmental protection that would permit local jurisdictions within this country to deviate from or modify the undertakings set forth in those treaties. Instead, the Congress and the federal agencies charged with implementing Congressional directions have expressed a clear and recurring expectation that effective protection of the national interests in safety and the environment of the nation's waterways requires a uniform national regime and a single decision maker that can speak for the country.

The reasoning of the Court of Appeals permits, at least within the Ninth Circuit, federal standards to be displaced within the boundaries of non-conforming states. Federal law ceases to be "supreme" and becomes dependent for its meaning and existence on the interpretations, activities, and forbearance of state governments acting unilaterally. National judgments governing vessel safety and environmental concerns thus are superseded within the boundaries of states with differing views. This is a constitutionally repugnant result.

From the commencement of this litigation in federal district court, neither the State of Washington nor its supporters have argued that the State's vessel regulations lie outside the subject matters or content of federal statutes and regulations relied on by Intertanko or that the State regulations escape preemption because they fall within a void of federal regulation. Instead, the State argued, and the Court

of Appeals largely agreed, that a savings provision in the Liability and Compensation title of the Oil Pollution Act of 1990 (section 1018, 33 U.S.C. § 2718) reflects an intent of Congress to authorize the states and localities to impose what the State describes as "more stringent oil spill prevention measures" including the vessel and crew-specific regulations challenged by Intertanko. *See* State Respondents' Brief in Opposition to Petitions for Certiorari at 20. Intertanko submits that reliance on this savings provision has distorted dramatically virtually every aspect of the lower courts' constitutional analysis. The function of section 1018 within the Oil Pollution Act of 1990 is, importantly but strictly, to preserve at all levels of government — federal, state and local — preexisting authority to impose penalties, fines or liabilities relating to oil discharges from vessels and all other facilities or installations.

The reasoning and holding of the Ninth Circuit in the case below, if extended to other coastal states, create the prospect of vessels that meet in all respects every applicable federal and international safety and marine environmental protection standard being barred from or criminally penalized for participating in the interstate and foreign commerce of the United States within any state willing to depart from the federal structure of regulation. Such a result is as constitutionally inadmissible now as it was at the commencement of the Republic under the Constitution.

ARGUMENT

Intertanko challenges on federal constitutional principles the enactment and enforcement by the State of Washington of a vessel safety and marine environmental protection program that imposes on vessels and their crews requirements and standards that differ from applicable federal requirements. (JA-7, No. 106, filed 6/3/96, Plaintiff Intertanko's Memorandum in Support of Motion for Summary Judgment at 28-48.) The matter is unusual in that there is but one reported prior case where a state or local

government has attempt to act directly on maritime regulatory subject matters so prominently and extensively occupied by the federal government. *See Ray v. ARCO*, 435 U.S. 151 (state regulation of vessel design, construction and equipment features invalidated).[6] In that case, all elements of the State of Washington's earlier efforts to interpose its own standards on subjects of mandatory federal vessel regulation were held unlawful by this Court. Since *Ray*, there has been a substantial expansion of the scope and complexity of federal standards and requirements governing tank vessels. The holdings and rationale of *Ray* compel a renewed vindication of federal capabilities for ensuring the safety and environmental protection of the nation's waterways.

It is not uncommon that this Court has reviewed controversies concerning the effect of federal regulatory standards on state causes of action, remedies or other state interests.[7] It is far less common that the Court is presented,

6. Other instances in which States or local governments have been permitted to regulate vessel-related activities in the absence of a federal rule include dispositions from the Ninth Circuit in *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985). Intertanko regards these cases as distinguishable from the case at bar because the contested state or local activity was directed to areas in which there was no clear federal presence. *Chevron* is a troubling case, the holding of which can only be reconciled with Intertanko's understanding of the law if it is confined to the principle that vessel discharges (*i.e.*, actual releases of pollutants) onto state waters are subject to state regulation under "shared federalism" principles of the Clean Water Act and are segregable from on-board vessel subject matters governed by the Port and Waterways Safety Act.

7. Within the maritime field alone, federal courts have been called upon to review, *inter alia*, preemption issues involving state licensing (*Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 (1824); pilotage (*Cooley v. Board of Port Wardens*, 12 Howard (53 U.S.) 299 (1852)); (Cont'd)

as it is here, with so stark a coincidence of subject matters, objects and purposes of federal and state requirements and standards. Sixteen state regulations addressing crew and vessel standards were challenged by Intertanko. Each of the sixteen regulations corresponds directly with federal vessel standards addressing the same subjects. (*See* Pet. App. K at 349a-353a.) Such state standards and requirements unilaterally substitute their requirements for legitimate judgments of the federal government that are intended to have nationwide application.

Express preemptive statements of the United States Coast Guard, the agency charged with administration of federal vessel safety and marine environmental protection programs, preempt the State regulations. Prior decisions of this Court that have recognized the implicitly preemptive nature of the federal statutes that impose standards for vessel safety and marine environmental protection. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151; *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937). Finally, the extensive international content of federal vessel safety and marine environmental protection standards that flows into the corpus of federal law by U.S. accession to international treaties and conventions compels deterrence of unilateral non-federal departures from the agreed upon standards, requirements and procedures of those

(Cont'd)
local mooring and anchorage restrictions (*Barber v. Hawaii*, 42 F.3d 1185 and *Beveridge v. Lewis*, 939 F.2d 859; tugboat safety inspections (*Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937)); remedies available to maritime workers for death or injury (*Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)); municipal restrictions on air pollution from vessels (*Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)); enforcement of maritime contracts (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961)); and applicability of state *forum non conveniens* concepts in maritime-related civil litigation (*American Dredging Co. v. Miller*, 510 U.S. 443 (1994)).

undertakings. The power of the national government to commit the nation as a whole to adherence to international accords is illusory if those undertakings have meaning and effect only until abandoned or modified by individual states.

Prior to the case at bar, rare and scattered instances of local governments asserting regulatory jurisdiction over vessel-related subject matters have been permitted only in the voids or on the outer periphery of federal programs. *See, e.g., Ray v. ARCO*, 435 U.S. 151 (state tug escort requirement permitted in absence of federal regulations); *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960) (municipal smoke abatement restrictions applied to vessels); and *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937) (state inspection of motor-driven tugs permitted where no federal inspection requirement existed). In this matter, however, petitioners Intertanko and the United States bring to the Court's attention an instance in which the federal judiciary has permitted a state government to impose regulations that directly coincide with on-board subject matters and legislative purposes of federal statutes governing vessel safety and marine environmental protection, matters of explicit, historic national concern.

For the Supremacy Clause to have meaning and effect in the field of vessel safety and marine environmental protection, there cannot exist differing state requirements governing the same subjects and purposes when the federal government has acted pursuant to constitutionally-enumerated powers. The applicable general rule governing such overlap of state and federal authorities in on-board maritime subject matters clearly within the competence of the federal government to regulate, is that the state rule must give way. The field of vessel safety and marine environmental protection is preempted.

The purposes and subject matter of federal regulation are manifest. The structure and content of federal programs are pervasive and incompatible with divergent local

initiatives. Uniformity of standards on both national and international levels is frequently identified as a national objective. The Nation must be able to address complex industrial issues affecting maritime safety and the environmental protection forcefully at home and abroad. Intertanko therefore submits that none of the challenged elements of State incursion into on-board safety requirements heretofore regulated exclusively by the federal government can be countenanced.

Exceptions to the necessarily dominant federal role are few and well-marked. Express Congressional authority to the states can be found in the areas of pilotage (46 U.S.C. § 8501)[8] and recreational boating safety and registration (46 U.S.C. chs. 121, 125 and 131). States also may act in vessel traffic safety subject matters for which the Congress has left discretion to federal authorities if those authorities (in this instance, the United States Coast Guard) have not exercised such discretion. *Ray*, at 435 U.S. at 171-72. No such subject matters are at issue here.

I. THE CONSTITUTION EXPRESSLY GRANTS POWERS TO THE FEDERAL GOVERNMENT TO REGULATE MARITIME ACTIVITY BETWEEN THE STATES AND WITH FOREIGN NATIONS — WHEN THE NATION SO ACTS, ITS ACTIONS ARE SUPREME AND CANNOT BE MODIFIED BY UNILATERAL STATE OR LOCAL ACTION

Maritime commerce among the states and with foreign nations has been a central, overriding concern of the federal government since its inception. Interference with commerce between the states under the Confederation led quickly to widespread calls for a national government with clear authority to impose uniform requirements for interstate and

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8. The pilotage exception is one of venerable origins, having been enacted by the First Congress of the United States. Act of August 7, 1789, 1 Stat. 54.

international commerce.[9] At that time, of necessity, virtually all international commerce was maritime. Many of the great controversies of the early years of the Republic related to use of and access to the seas for purposes of commerce and defense. The substantial presence of the national government in matters relating to waterborne interstate and international commerce has since been exercised largely without contest or conflict from local governments.

In the public debates over the desired characteristics of post-Confederation national government, Alexander Hamilton addressed the need for placing maritime matters squarely in the cognizance of the federal judiciary:

> The most bigoted idolizers of State authority, have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[10]

Within the Constitution, this concern that interstate and international commerce be regulated by the national government appears repeatedly. Article I, section 8 places

9. "The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade." *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1, 15, (1824) (syllabus of argument by Mr. Webster.)

10. ***The Federalist* No. 80 (Alexander Hamilton) (McLean's Edition, NY)**. Although Hamilton here addressed the necessity of the judiciary to promote a uniform body of admiralty and maritime law under provisions enshrined in Article III, § 2, Clause 1 of the Constitution, we cite the sentiment here to support our view that the demands of maritime commerce were central elements of early constitutional judgments about the necessity of a strong federal role and that the commerce, foreign affairs and admiralty provisions of the Constitution reflected a purpose to invest all three branches of the federal government with responsibility for national, not sectional or local, approaches to maritime commerce.

with the national government the power to "lay and collect Taxes, Duties and Imposts" on a uniform basis throughout the United States. This power is joined in the same section with the express authority to "regulate Commerce with foreign Nations, and among the several States . . ." and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. Art. I, Section 8, Clauses 1, 3, and 18. Article I also forbids non-uniform "Regulation of Commerce or Revenue" as between ports in the several states. U.S. Const. Art. I, Section 9, cl. 6.[11] Under Article III, the judicial power of the United States is extended "to all Cases of admiralty and maritime Jurisdiction. . . ." U.S. Const. art. III, § 2.

These express powers, in the aggregate, define a vigorous national government distinguished from its immediate predecessor in its ability to promote a strong navy and merchant marine (*The Federalist*, No. 11 (Alexander Hamilton)), and to ensure a strong national and international commercial environment. It has been clear from the beginning that "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation." *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 at 191. It is similarly clear that vessels are regulated as instruments of that commerce: "Vehicles of Commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by national legislation." *Japan Line, Ltd. v. County of Los Angeles*, 441

11. This provision also forbids state requirements that ". . . Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Although the State of Washington is not exacting "duties" in a customs sense, the record in the district court establishes that vessels from the high seas bound to Oregon ports on the Columbia River, a waterway the navigable channel of which lies within the borders of both Oregon and Washington, are being boarded and inspected in Oregon by Washington State officials to confirm compliance with the disputed Washington State BAP regulations. Affidavit of Miles Kulukundis, at JA-26.

U.S. 439, 449 (1979) (quoting *Railroad Co. v. Maryland*, 21 Wallace (88 U.S.) 456, 470 (1875)).

The characteristics of maritime trade and operations lead to express recognition of the value of uniformity in maritime matters. The federal national interest in maritime commerce "can be fully vindicated only if all operators of vessels or navigable waters are subject to uniform rules of conduct." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982). The value of uniformity is obvious:

> The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare.

State of Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924).

A. The Federal Statutory And Regulatory Scheme Governing Vessel Safety And Marine Environmental Protection Is Pervasive, Comprehensive, Complex And Largely Non-discretionary. It Is Intended By The Congress And Deemed By This Court To Be Preemptive In Its Design And In Its Operation

Throughout our history, the federal government of the United States has imposed safety and environmental protection standards on vessels. U.S. Const., Art. I, Section 8, cl. 3. Federal inspection laws intended to prevent boiler explosions were first imposed in 1838. These safety and inspection provisions were extended in 1852, 1864 and 1871. H.R. Rep. No. 338, 98th Cong., 1st Sess. 136-137, *reprinted in* 1983 U.S.C.C.A.N. at 948-949, 97 Stat. 500. Federal legislation directed specifically at tank vessel safety was enacted in 1936 (The Tank Vessel Act, Rev. Stat. § 4417a,

ch. 729, 49 Stat. 1889, codified as amended at 46 U.S.C. § 391a). The requirements of that Act were extensively enlarged and amended in 1972 with the passage of the PWSA, the federal statute here principally relied on by Intertanko as indicative of a preemptive federal presence in the field of vessel safety and marine environmental protection. Among the expressly identified purposes of the PWSA is to provide ". . . increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. § 3703(a). The subject matters (on-board operational, personnel qualification and training requirements for tank vessels) and purposes (safety and environmental protection) define a field of federal activity in which the State of Washington now wishes to participate.

The PWSA, as amended, is part of an extensive body of marine safety and environmental protection requirements and standards that includes regulations issued by the United States Coast Guard pursuant to delegation from the Secretary of Transportation, and a comprehensive set of international maritime safety and environmental treaties. All of these federal sources of tank vessel regulation are "the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Given the mobile and international nature of the maritime industry, this body of law depends on both national and international uniformity and coordination for its effective operation. This Court in *Ray v. ARCO* found the content of the entirety of the PWSA to be strongly preemptive of state action. *See Ray*, 435 U.S. at 164-68 & n.15.

The PWSA contains two titles. Title I, now located at 33 U.S.C. §§ 1221-1236, permissively authorizes ("the Secretary may . . .") the Secretary of Transportation to establish vessel traffic control systems, to restrict operation of tankers not having specified capabilities, and to negotiate international treaties on vessel safety. Title II of the PWSA employs mandatory language that requires ("the Secretary

shall . . .") the Secretary to adopt uniform federal regulations for tanker design, construction, equipment, operation, personnel qualifications, manning and training. *See* 46 U.S.C. § 3703 *et seq*. The Secretary of Transportation's obligations under this statute have been delegated to the United States Coast Guard pursuant to 46 U.S.C. § 2104.

The distinction between the discretionary subject matters of Title I, subject matters Intertanko contends are not directly implicated in this litigation, and the mandatory requirements of Title II, subject matters we posit to be central to this case, was addressed by the Court in its 1978 *Ray* decision. In *Ray*, the Court assessed prior efforts by the State of Washington to assert regulatory jurisdiction over tank vessel subject matters already governed by federal regulations. The decision struck down all Washington State vessel regulations then at issue. Those regulations invaded Title II PWSA federal subject matters of design, construction, and equipment requirements. *Ray*, 435 U.S. at 164-171, 173-178. Importantly, the Court in *Ray* let stand only a State pilotage requirement governed by the venerable and express pilotage exception of 46 U.S.C. § 8501 (*see* n.8, *supra*) and the State's tug escort requirements that were deemed within Title I PWSA discretionary subject matters:

> . . . the relevant inquiry *under Title I* with respect to the state's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all.

Ray, 435 U.S. at 171, 172 (emphasis added). Finding that no federal regulations governing tug escorts had been promulgated at the time the case was decided, the Court remarked that "[i]t may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the state's requirement need not give way under

the Supremacy Clause." *Ray*, 435 U.S. at 172.[12] The Court thus confirmed that, in the absence of a federal rule, the State's tug escort regulations could operate until such time as the cognizant federal agency acted to assert its discretion. *Id.*

Every state regulation challenged here falls within the meaning of mandatory Title II subject matters (operations, personnel qualifications and manning).[13] Intertanko has yet to discern any attempt by the State or its supporters to argue that the State is acting in a vacuum of federal action under Title I of PWSA.

Significantly for the supremacy and preemption analysis here, the PWSA authorized the Coast Guard to establish minimum safety standards for structures on navigable waters, but expressly preserved to the states authority to promulgate higher safety equipment requirements for structures than those established by the Coast Guard. *See* 33 U.S.C. § 1225(b); *see also Ray*, 435 U.S. at 164-171, 173-178. This express grant of authority to states is limited to structures only. *Id.* This Court observed in *Ray* that the effect of this provision was to "impliedly forbid higher state standards for vessels." *Ray*, 435 U.S. at 174. This implied prohibition remains valid and controlling.

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12. This disposition is consistent with the Court's pre-PWSA approach to Washington State motor tugboat inspection requirements in *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937). There the Court permitted the State to operate in a vacuum of federal regulation (federal inspections then applied only to steam-driven tugs), but cautioned that had the State attempted "to impose particular standards as to structure, design, equipment *and operation*," the State would "encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." *Kelly*, 302 U.S. at 15 (emphasis added).

13. The particular BAP regulation governing vessel design, equipment and technology was found unlawful by the Court of Appeals and is, therefore, not addressed in this petition.

Since *Ray*, the subject matters and breadth of tank vessel regulations and requirements mandated by Congress have expanded dramatically. This Court's opinion in *Ray* was issued the same year that the Port and Tanker Safety Act ("PTSA"), Pub. L. No. 95-474, 92 Stat. 1471 (1978) substantially enlarged the vessel safety and marine environmental protection provisions of the PWSA. The PTSA retained the pre-existing vessel safety and environmental protection core of PWSA, but added substantially to its provisions. Mandatory subjects of federal regulation were expanded to include personnel qualifications, manning, and training requirements for U.S. and foreign tankers operating in U.S. waters.

As enlarged by PTSA, broad authority is imparted to the Secretary to regulate tankers. Chapter 37 of Title 46 addresses carriage of dangerous liquid bulk cargoes, including oil, by commercial vessels. Section 3703(a) now expressly directs that the Secretary:

> shall prescribe regulations for the design, construction, alteration, repair, maintenance, *operation*, equipping, *personnel qualification*, and *manning* of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment.

46 U.S.C. § 3703(a) (emphasis added). The subject matters of the remaining disputed State of Washington tank vessel regulations directly correspond to the subject matters emphasized above. PWSA additionally requires the establishment of minimum standards for self-propelled tankers (46 U.S.C. § 3708), and requires foreign vessels to show evidence of compliance with Chapter 37 and regulations prescribed thereunder (46 U.S.C. § 3711). Other pertinent provisions of Title 46 include: (1) Part D, which requires the Secretary to establish procedures for reporting

and investigating marine casualties; (2) Part E, which governs personnel licensing and qualifications and (3) Part F, which authorizes the Secretary to control vessel manning requirements.

Section 9101 of Title 46 establishes standards for foreign tank vessels, and directs that the "*Secretary shall* evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37" of Title 46 applies. 46 U.S.C. § 9101 (emphasis added). Thus, Congress has expressly authorized the Secretary of Transportation of the United States to determine whether a country has failed to maintain or enforce standards at least equivalent to those required by the United States or international standards accepted by the United States. *Id.* No other official, federal, state or local, has been so charged by the Congress.

In 1983, for the stated purpose of establishing one clear and concise scheme of marine safety laws, Congress enacted Subtitle II of Title 46, United States Code, ("Shipping"), Pub. L. No. 98-89, 97 Stat. 500 (1983), as amended. This codification included existing provisions of Title II of PWSA. Under Title 46, the Secretary of Transportation is accorded broad powers of superintendence over the U.S. Merchant Marine and is authorized to prescribe regulations to carry out the provisions of the law. 46 U.S.C. § 2103. The discretionary elements of Title I of PWSA remain uncodified and are now located in Title 33 of the United States Code ("Navigable Waters"). Congress has enacted various other amendments to Title 46, the most recent in 1998. *See* Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, 112 Stat. 3411 (codified in scattered sections of 46 U.S.C.).

The process of enlarging the extent and complexity of Title 46 continued in 1990 when Congress enacted additional changes to Title 46 in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). Title IV of OPA 90 ("Prevention and Removal") expanded yet again the

already substantial federal presence in the field of tank vessel design, construction, personnel, equipment and operations with explicit mandates to the Secretary of Transportation to promulgate new marine safety and environmental regulations.[14] These provisions, once enacted, were lodged in Title 46 along with the vessel safety and environmental protection provisions of PWSA.

In addition to these statutes, there exists a vast network of federal regulations implementing both federal statutes and international treaty requirements.[15] Many of these regulations governing federal subject matters of design, construction, operations, personnel qualifications and training, manning and management practices were accompanied, when promulgated, by express preemptive statements declaring a federal judgment that State action is precluded. Examples of these preemptive statements by the United States Coast Guard were included in the appendix to Intertanko's Petition for a Writ of Certiorari. (Pet. App. H, 269a-290a.) Intertanko relied below, and continues to rely here, on these express

14. Title IV OPA 90 amendments require the Secretary of Transportation to act in matters including: mandatory review of alcohol and drug abuse and other matters in issuing licenses and merchant mariners' documents (OPA § 4101); renewal periods for licenses and documents (OPA § 4102); suspension and revocation of licenses and documents for alcohol and drug abuse (OPA § 4103); manning standards for foreign tank vessels (OPA § 4106); vessel traffic systems (OPA § 4107); periodic gauging of plating thickness of tankers (OPA § 4109); overfill and tank level or pressure monitoring devices (OPA § 4110); study of tanker navigation safety standards (OPA § 4111); tank vessel manning (OPA § 4114); double hull construction for tank vessels (OPA § 4115); and pilotage criteria (OPA § 4116). Elements of OPA dealing with liability and compensation, including section 1018's non-preemptive language were codified in Title 33 ("Navigation and Navigable Waters"), while provisions addressing vessel design, operation, equipping, personnel qualification and manning specifically amended Title 46. (Pet. App. F at 222a-261a.)

15. *See* n.3, *supra*.

preemptive statements as compelling indication that state action is barred in these federally regulated subject matters.

B. The Federal Statutory Regime Governing Vessel Safety And Marine Environmental Protection Is Closely Integrated With And Derived From International Vessel Safety And Marine Pollution Control Standards And Requirements

A unique feature of federal law governing vessel safety and marine environmental protection is its close integration with comprehensive vessel standards established through international agreements with other maritime nations.[16] Throughout this century, the United States and other leading maritime nations have promoted the establishment of internationally accepted uniform marine safety and marine environmental protection standards. These international commitments, once agreed to by the federal government, are

16. An analogous national and international approach driven by similar considerations is found in the field of civil aviation. *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 119 S. Ct. 662, 671 (1999) (interpreting Warsaw Convention to be preemptive of State actions where claim does not meet Convention's liability requirements); and *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638-39 ("pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls.") and stating that interdependence of safety and efficiency standards "requires a uniform and exclusive system of federal regulation if the Congressional objectives underlying the Federal Aviation Act are to be fulfilled."; *Schaeffer v. Cavallero*, 29 F. Supp. 2d 184, 185 (S.D.N.Y. 1998) (finding that "[I]n keeping with the federal government's paramount interest in regulating aviation, all state laws must be interpreted consistently with this over-riding federal law.") (citing to *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring); and *Abdullah v. American Airlines, Inc.*, 969 F. Supp. 337, 344-348 (D.V.I. 1997) (discussing at length "pervasive regulation" of aviation safety as preempting state laws concerning uniform regulation and noting exception for personal injury claims).

subsumed into the corpus of federal statutes and regulations by operation of Article VI of the Constitution and by the practical necessity of conforming U.S. requirements and procedures to those committed to in international agreements. Title 46, for example, contains several provisions concerning international marine safety and environmental protection requirements. This reflects the necessity of implementing these standards in an atmosphere of international comity and reciprocity.[17]

This Court noted in *Ray* that there existed a "decided congressional preference for arriving at international standards for building tank vessels." *Ray*, 435 U.S. at 166. The Court cited legislative history of the PWSA to indicate a preference for international approaches to other Title II PWSA subject matter areas such as vessel maintenance and operation: "multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards." S. Rep. No. 724, 92d Cong., 2d Sess. At 23 (1972) *reprinted in* 1972 U.S.C.C.A.N. 2766, 2783 (cited in *Ray*, 435 U.S. at 167, n.16).

For the preemptive positions of Intertanko and the United States to prevail in this cause, it should not be necessary for petitioners to show that the international vessel safety and

17. *See, e.g.*, 46 U.S.C. § 3303(a) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States is currently a party"); and 46 U.S.C. § 3711 ("The Secretary may accept any part of a certificate, endorsement, or document issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance"); *see also* 46 U.S.C. § 5109 (extending reciprocity under International Convention of Load Lines); and 46 U.S.C. § 14306 (extending reciprocity under International Tonnage Convention).

pollution prevention regime is perfect in its design or execution.[18] The Congress and other elements within the United States government have on occasion expressed impatience or reservations about the pace of development of international vessel safety standards. The legislative history of PTSA reflects considerable discussion of the interrelationship between federal vessel standards and the desirability of promoting international solutions to vessel safety and marine pollution prevention issues. Nonetheless, the multi-national nature of the marine industry and the mobility of vessels dictate that there be a high degree of international cooperation in maintaining vessel safety standards. When the appropriate elements of the national government of the United States have negotiated, agreed to and ratified these international undertakings, they are taken into the body of federal law and enjoy with purely domestic enactments the status of "supreme Law of the Land" by virtue of Article VI of the Constitution. Because international maritime agreements describe a complex system of controls exercised both by the nations in which vessels are registered ("flag states") and nations at whose ports the vessels call ("port states"), federal law governing vessel safety and

18. The State and its supporting intervenors have countered reliance by Intertanko and the United States on international agreements by criticizing the effectiveness of the international safety and pollution control regime. These criticisms, even if deemed valid for purposes of argument, are quite beside the fundamental constitutional point of whether the federal government can commit the nation as a single entity to a uniform approach to marine safety. While treaties may not always or perfectly achieve their objectives, the power to make policy on matters of national interest is a "national one from the compulsion of both necessity and our Constitution." *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (referring to currency exchange policies). Once the national government has addressed a policy concern for the country as a nation, the states cannot abridge treaty rights because of concern "that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Id.* at 198.

marine pollution prevention must conform in a number of ways to established international controls on vessel safety and quality standards.[19]

While the array of international agreements and treaty commitments to which the United States is a party and that affect vessel safety and marine environmental protection is quite broad, Intertanko's preemption arguments to the courts below have largely focused on four international agreements: the International Convention for the Safety of Life At Sea, 1974 ("SOLAS") and its amendments;[20] the International Convention for the Prevention of Pollution from Ships, 1973 and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships ("MARPOL 73-78");[21] the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("STCW") and 1995 amendments thereto;[22] and the Convention on the International Regulation for Preventing Collisions At Sea, 1972 ("COLREGS").[23] These four conventions cover the domain of subject addressed by the challenged State vessel regulations and establish an international system of standards, certifications, inspections, and reciprocal treatment that is immediately damaged if state, provincial or local governments act in ways contrary to the obligations of the national government signatories.

There are a number of additional international agreements, both bilateral and multi-lateral, which fortify Intertanko's claim here that the subject matters of the challenged Washington State regulations are heavily freighted with functions and commitments that can only be undertaken by the national government of the United States

19. *See* n.17, *supra*.

20. 32 U.S.T. 47, T.I.A.S. No. 9700.

21. 17 I.L.M. 546.

22. S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624.

23. T.I.A.S. No. 8587, *reprinted in* 12 I.L.M. 734 (1973).

acting not only pursuant to its powers to regulate commerce, but also through exercise of its foreign affairs authority. Among these additional agreements that define profoundly multi-national safety and pollution prevention regime are the United Nations Convention on the Law of the Sea ("UNCLOS"), bilateral agreements between the United States and the Government of Canada concerning vessel traffic management in the waters along the international boundaries between those two nations, particularly in the Straits of Juan de Fuca, and any number of bilateral friendship, commerce and navigation (FCN) treaties between the United States and other maritime nations. These FCN treaties typically guarantee to the signatory parties that vessels and other instrumentalities of bilateral commerce will be granted reciprocal treatment no less favorable than that accorded to other similarly situated nations.[24]

The constitutional point of directing the Court's attention to the substantial degree to which vessel regulatory standards are governed by international commitments of the national government of the United States is that such commitments are well within the enumerated powers of the federal government; that such agreements, once ratified, become the Supreme Law of the Land; that the decisions by the national government to pursue and to accede to such undertakings reflect, of necessity, a constitutional reconciliation of local and national objectives by the federal authorities authorized to make such judgments; and that such commitments do not permit state and local governments to disregard national decisions because they happen to have other ideas about optimal approaches to regulatory issues.

24. International maritime agreements are discussed in detail by Professor Craig Allen in his four volume article concerning federalism. *See* Craig H. Allen, *Federalism in The Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. of Mar. L. and Com. 565-613 (1998).

The Supremacy Clause leaves no doubt that U.S. treaty provisions are "the supreme Law of the Land." No lesser status attaches to international conventions governing vessel safety and marine environmental protection conventions. State law must give way "when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230-231 (1942).

II. THE CONTENT, MECHANICS, SUBJECT MATTERS, AND SCOPE OF FEDERAL VESSEL SAFETY AND MARINE ENVIRONMENTAL PROTECTION PROGRAMS REFLECT AN INTENT OF THE NATIONAL GOVERNMENT THAT FEDERAL LAW BE EXCLUSIVE; STATE EFFORTS TO REGULATE VESSEL OPERATIONS, PERSONNEL QUALIFICATIONS, TRAINING AND MANNING ARE PREEMPTED

Intertanko has approached preemption analysis in this matter from the perspective that the implied preemption analysis of *Ray* compels invalidation of Washington State's resurgent efforts to regulate in Title II, PWSA subject matters or Title I subject matters in which a federal presence has been established. Additionally, there now exists a considerable body of express preemptive utterances by the United States Coast Guard that did not exist when *Ray* was decided. Because of its view of section 1018 of OPA 90, the Court of Appeals dismissed these express preemptive statements as beyond the lawful authority of the Coast Guard. We submit that section 1018 supports no such conclusion and that, if this element of error is rectified, Coast Guard preemptive statements must be given substantial controlling weight.

A. The Coast Guard Has Spoken With Express Preemptive Effect On Marine Safety Regulations. The Court Of Appeals Erred In Rejecting These Statements As Being Outside Lawful Coast Guard Authority

Not only has the scope, content and complexity of federal marine safety and environmental protection programs expanded since *Ray*, the federal government has also added to the preemptive atmosphere surrounding its programs through direct preemptive statements. The absence of such statements compelled an implied field preemption analysis in *Ray*. Preemptive qualities of more extensive federal programs are now even more apparent than in 1978. Where express federal preemption exists, implicit preemptive analysis is unnecessary.

A federal agency, acting through its rulemaking processes, can effect preemption of state law. *See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982). That the Coast Guard is entrusted by Congress with administration of a complex and comprehensive regulatory regime is evidence in itself of preemptive intent. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). Moreover, the Coast Guard's own opinion as to the degree of preemption inherent in a statute is of value to the Court in determining whether state action is ousted. *See Farmers Educational & Co-operative Union v. WDAY, Inc.*, 360 U.S. 525, 532-33 (1959). It is sufficient to establish preemption that the agency acted within its delegated authority and that the agency itself intended to preempt. *See De La Cuesta, supra*, 458 U.S. at 154.

The Coast Guard has declared a number of BAP Regulation subject matters to be within the exclusive competence of the federal government. In each instance, the Coast Guard has stated that its regulations have preemptive effect, citing the need for uniformity or standardization.

B. Coast Guard Pre-emptive Statements Address Manning, Navigational Safety, Drug And Alcohol Testing, And Operational Requirements; These Statements Compel State Regulations In The Same Subject Matters To "Give Way"

When issuing federal regulations requiring that each tanker underway have an engineering watch and that a tanker navigate with two licensed deck officers on watch on the bridge, the Coast Guard stated "it is a well-settled principle that regulations concerning manning of commercial vessels in U.S. waters are the exclusive domain of the U.S. Coast Guard . . . the Coast Guard intends the manning provisions to preempt State action addressing the same subject matter." *See* 58 Fed. Reg. 27,628 at 27,632 (May 10, 1993); *see also* 57 Fed. Reg. 45,664 at 45,667 (Oct. 2, 1992) (prop. rule); and 57 Fed. Reg. 12,378 at 12,379 (Apr. 9, 1992) (prop. rule). (Pet. App. H at 270a-275a.) This preemptive utterance invalidates BAP Regulation 317-21-200.

In 1994, the Coast Guard issued regulations concerning procedures for the operation and testing of steering gear. In promulgating the requirement on operation of steering gear for vessels underway, the Coast Guard stated that it intended to oust State action: ". . . the Coast Guard intends to preempt State or local laws on the navigational safety of these vessels." *See* 60 Fed. Reg. 24,767 at 24,771 (May 10, 1995). (Pet. App. H at 286a.) The Coast Guard thus expressly preempted state or local action in the subject matters of BAP Regulation 317-21-210 as well as other BAP Regulations that address operations and navigational safety (*e.g.*, WAC 317-21-200 (Watch Practices) and WAC 317-21-205 (Navigation)).

In 1993 and 1995, the Coast Guard issued various rules regarding uniform federal regulation of drug and alcohol testing. In each of these the Coast Guard spoke preemptively: "The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been

committed to the Coast Guard by Federal statutes." *See* 58 Fed. Reg. 68,274 at 68,277 (Dec. 23, 1993). (Pet. App. H at 287a.) Federal statutes and regulations "preempt State and local regulations regarding drug testing programs requiring the testing of employees on-board U.S. vessels." *Id.*[25] These statements expressly preempt state actions in subject matters addressed by BAP Regulation 317-21-235.

On July 30, 1996, in a final rule mandated by OPA concerning operational measures for single hull tank vessels, the Coast Guard stated that it regarded federal operational rules as "preeminent." 61 Fed. Reg. 39,772-73 (1996). The Coast Guard regulations relate to, among other things, bridge resource management, and accordingly preempt state action on subject matters addressed by BAP Regulations 317-21-200, -205, -210, -215, and -220.

In a 1995 notice of proposed rulemaking to amend federal regulations to allow for alternative means to comply with vessel regulatory standards, the Coast Guard stated that:

> The authority to regulate safety requirements of U.S. vessels is committed to the Coast Guard by statute. Furthermore, since these vessels tend to move from port to port in the national market place, these safety requirements need to be national in scope and avoid numerous, unreasonable and burdensome variances. Therefore, this action would preempt State action addressing the same matter.

60 Fed. Reg. 32,480 (1995) (CR 106 at Exh. 5(F)); *see also* 61 Fed. Reg. 68,517 (1996) and 62 Fed. Reg. 17,020 (1997) for identical or similar statements. These statements establish the Coast Guard's express preemption of

25. The Coast Guard has repeated this preemption statement on several occasions using identical or virtually identical language. *See* 60 Fed. Reg. 67,062 at 67,063 (Dec. 28, 1995); 58 Fed. Reg. 31,104 at 31,106 (May 28, 1993). (Pet. App. H at 284a and 289a, respectively.)

Washington's general asserted authority to regulate and inspect vessels pursuant to RCW 88-46-040. More fundamentally, these statements by the Coast Guard manifest a condition of express preemption that compels summary invalidation of BAP Regulations that address the subject matters identified by the Coast Guard.[26]

C. The Implied Preemption Analysis Of Ray Compels A Determination That State Regulations Are Unlawful

In addition to the preemptive impact of express statements by the federal government, the entirety of the State regulations here under attack are subject to an implied preemption analysis both because the field is occupied by federal actions and because the State regulations impermissibly conflict with federal purposes and objectives.

To the extent that any element of the State's regulatory program survives the impact of the express preemptive statements of the Coast Guard, *Ray*'s analysis under the Supremacy Clause sweeps before it all elements of the State BAPs that correspond to Title II PWSA mandatory subject

26. A legal opinion from the Chief Counsel of the Coast Guard, Rear Admiral P. E. Versaw, dated January 30, 1991, summarized the Coast Guard's internal views on the issue of preemption and the effects of section 1018. This opinion was part of the record before the courts below. (JA-42 to JA-63.) The Chief Counsel's opinion outlines a broad approach to reviewing state laws vis-a-vis federal preemption principles, *Ray v. Atlantic Richfield*, and OPA. This post-OPA, but pre-BAP Coast Guard legal opinion is consistent with the positions of Intertanko and the United States. The opinion asserts that the States are preempted from imposing vessel design, construction, operations, manning, training, equipment and safety requirements, but may regulate liability, compensation, and response. This internal Coast Guard legal analysis, undertaken before Washington State's BAP Regulations became a litigated issue, aligns with Intertanko's positions and is contrary to occasional protests from State officials that the Coast Guard has wavered in its preemption analysis.

matters or Title I PWSA subject matters where the federal government has acted pursuant to discretionary authority from Congress. Finally, we submit that conflicts with federal purposes and objectives and impairment of "federal superintendence of the field" as identified by this Court in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and *Florida Line and Avocado Growers Inc. v. Paul*, 373 U.S. 139, 142 (1963), compel invalidation of the State BAP regulations under conflict preemption analysis.[27]

The concern that State actions might undermine federal interests is heightened where the state or locality seeks to regulate "primary conduct" of the vessel as opposed to peripheral issues that impose penalties or liabilities. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994). Here the State of Washington purports to act directly

27. Throughout this litigation, the State has occasionally claimed that Intertanko has "agreed that it was not impossible to comply with the BAP rules, federal law and Coast Guard rules." *See, e.g.*, State Respondents' Brief in Opposition to Petitions for Certiorari at 17 and Intertanko response to interrogatory at JA-87. This claim overstates the decision by Intertanko to rest its theory of conflict preemption in the summary judgment context on the "obstacle to the full accomplishment and execution of federal purpose" test enunciated in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and the analysis of "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of the field" criterion set out in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 139, 142 (1963). It must by now be clear to the State that Intertanko views the field of vessel safety and marine environmental protection as one heavily laden with federal officials charged with significant responsibilities of superintendence of the merchant marine and international vessel traffic under Title 46, a superintendence that is significantly impaired by State departures from the details of that scheme, and thus vulnerable under conflict preemption analysis. Because we contend, however, that the BAP rules must fall under principles of express and field preemption, we here emphasize those issues. The focus of the United States has to this point been primarily on a conflict preemption analysis.

on the primary conduct of vessels — operations, procedures, navigation, crew qualifications and training — of vessels and their crews. Thus, the invasive impact of the State actions is direct and disfavored.

The earmarks of implied field preemption conditions have been described as follows:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted).

Implied preemption is also said to occur when the scheme of federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation" or the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County, Florida v. Automated Med. Labs*, 471 U.S. 707, 713 (1985) The above-described system of tank vessel regulation does not suggest room for "supplementary regulation" by the states. The federal interest is historically dominant.

The regulation of vessels, their crews, operations and activities is, under federal and international law, an activity closely controlled through inspections and certifications of the vessels, their crews and their management. Although the high seas leg of their voyages are less minutely controlled than are the flights of civil aircraft, tank vessels trading to or between the United States can be accurately said to sail

"only by federal permission, subject to federal inspection, in the hands of federally certified personnel under an intricate system of federal commands." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973) (quoting *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)). The PWSA, as amended by the PTSA, imposes on the Secretary of Transportation and his delegees a mandatory duty to prescribe standards and requirements governing tanker vessel "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies." 46 U.S.C. § 3703(a). An elaborate system of certificates and inspections, national and international, undergirds this system. This degree of detailed control over vessel operations, coupled with the non-discretionary structure of Congressional directives to the Secretary of Transportation compels a finding of field preemption in the subject matter areas listed in section 3703(a) of PWSA.

In circumstances in which the challenged state regulations reflect traditional applications of police powers, federal courts do not lightly presume to displace the exercise of such powers. *Medtronic v. Lohr*, 518 U.S. 470, 471 (1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is not such a circumstance. Here it is the State that advocates a new, not traditional, role for state power in its assertion of authority to regulate vessel operations, personnel qualifications, and manning, subjects historically regulated by the national government.

D. That The State BAP Regulations May Have Environmental Or Conservation Elements Or Particular Local Connections Does Not Change The Preemptive Effect Of Federal Law

In *Ray* the Court noted that previous decisions have spoken approvingly of "reasonable, non- discriminatory conservation and environmental protection measures." *Ray*, 435 U.S. at 164. The *Ray* opinion also identified the

disputed State tug escort provisions as being "akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures. . . ." 435 U.S. at 171. Experience suggests that the State here will endeavor to use these phrases either alone or in combination to excuse its efforts to regulate vessel operations, personnel qualifications, and manning and argue that the contested State vessel regulations fall within this realm of apparent permission. Intertanko notes that the *Ray* Court's reference to "reasonable, non-discriminatory conservation and environmental protection measures" was drawn from *Douglas v. Seacoast Products, Inc.* 431 U.S. 265, 277 (1977), a case in which Virginia fishing restrictions forbidding non-resident menhaden catches were found preempted by the Federal Enrollment and Licensing Act. The allusion in *Douglas* to acceptable conservation and environmental measures was based on nineteenth century decisions permitting state limits on fishing implements and methods. *See Manchester v. Massachusetts,* 139 U.S. 240 (1891) and *Smith v. Maryland*, 18 How. 71 (1855). Moreover, the qualification on this dictum in *Douglas* was that such measures were assumed to be "otherwise within their [the States'] police power." *Douglas,* 431 U.S. at 277. Here, of course, Intertanko contends that the individual states have never previously exercised police powers over questions of on-board vessel operational procedures, personnel qualifications, training and manning. Efforts to classify these activities as exercises of police powers ignore the historic and exclusive federal presence in these areas.

Similarly, the Court's decision in *Huron Portland Cement Co., v. Detroit*, 362 U.S. 440 (1960) provides no shelter for the State's aspirations. In that case, the Court upheld a Detroit municipal smoke abatement ordinance as applied to stack emissions from vessels moored within the city limits. The shipowner contended that the federal Boiler Inspection Act preempted the city's assertion of enforcement claims against

actual exhaust emissions from the inspected boilers during dockside operations. The Court reasoned that the Detroit ordinance and the federal boiler inspection statute had two entirely different purposes — vessel and passenger safety for the federal statute and air quality and cleanliness concerns for the municipality. This pronounced distinction of purpose spared the Detroit ordinance. When reviewed by the *Ray* Court, the prior cases permitting state action were distinguished with the observation that ". . . in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation." *Ray*, 435 U.S. at 164. This contrasted with the disfavored circumstance of both *Ray* and the instant case where the Title II PWSA purposes of "insuring vessel safety and protecting the marine environment" aim "precisely at the same ends" as the Washington State regulations. *Ray*, 435 U.S. at 165.

It is also evident that the reference in *Ray* to an "operating rule arising from the peculiarities of local waters" established nothing more than to place the disputed State tug escort provision within Title I of PWSA for preemption analysis purposes. 435 U.S. at 171. Once spotted within Title I, the Court looked to see whether the federal authorities had acted in the subject matter. 435 U.S. at 171-72. While the absence of a federal tug escort requirement in *Ray* preserved the State tug escort rule at least until federal action was taken, there are no state rules here at issue that fall outside established, acted-upon federal subjects of regulation.

III. SECTION 1018 OF THE OIL POLLUTION ACT OF 1990 DOES NOT AUTHORIZE STATE REGULATORY ACTIONS ADDRESSING ON-BOARD STANDARDS AND REQUIREMENTS FOR TANK VESSELS OPERATIONS, PERSONNEL QUALIFICATIONS AND MANNING

The district court and the court of appeals were encouraged in their permissive views of State activities in federal vessel safety areas by expansive interpretations of section 1018 of the Oil Pollution Act of 1990. Both courts relied on this provision to dispel the multiple layers of constitutional concern presented by both Intertanko and the United States. A proper interpretation of section 1018, however, compels both a finding of preemption and a reversal of the decisions of the courts below. Because of the critical role this provision played in influencing so many elements of the decision of the Court of Appeals, we here restate the pertinent language of sections 1018 (a) and (c):

> Title I – Liability and Compensation
>
> Section 1018 – Relationship to Other Law
>
> (a) Preservation of State authorities; Solid Waste Disposal Act
>
> Nothing in this chapter[28] or the Act of March 3, 1851 shall —
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to —

28. As enacted, section 1018 read "Nothing in this Act. When section 1018 was codified, all references to "Act" became "chapter." "This chapter" is entitled "Chapter 40 – Oil Pollution" of Title 33. 33 U.S.C. §§ 2701-2761. The Title IV spill prevention provisions to which the State wishes to extend non-preemption provision, are generally found in Title 46. 46 U.S.C § 7101 *et seq.*

> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*) or State law, including common law.
>
> * * *
>
> (c) Additional requirements and liabilities; penalties Nothing in this chapter, the Act of March 3, 1851 (46 U.S.C. § 183 *et seq.*), or section 9509 of title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of discharge, of oil.

Section 1018(a) and (c) of OPA 90 (33 U.S.C. § 2718(a) and (c)).

The words and terms used in section 1018 have all been defined and are susceptible of unambiguous interpretation. Title I of OPA 90 defines "discharge", liability", and "removal".[29] In addition, the United States Coast Guard has

29. *See* 33 U.S.C. §§ 2701(7), (17), (30).

defined both the phrase "substantial threat of discharge"[30] and "this Act".[31]

Section 1018 preserves, but does not expand, a narrow, pre-existing authority of state and local governments to impose liabilities, penalties and requirements subsequent to a discharge of oil from a tank vessel into state waters. The defining context of 1018(c) is particularly clear in view of the fact that it concludes with the limiting language "relating to the discharge, or substantial threat of discharge, of oil."

Judge Graber's dissent to the Court of Appeals denial of rehearing in *International Association of Tanker Owners v. Locke*, thoroughly examines the history and purposes of section 1018:

> First, Congress placed these preemption clauses in a Title that addresses only *liability and compensation* for oil spills that actually occur. That placement (especially considering the full wording of the clauses) suggests that Congress intended for the clauses to apply only to the provisions in that Title. A second contextual clue strengthens that inference: A separate section in Title IV contains its own preemption clause. *See* § 4202(c) (Title IV), codified at 33 U.S.C. § 1321(o)(2). Moreover, sections in other Titles of OPA 90 include their own preemption provisions as well. *See* § 5002(n) (Title V), codified at 33 U.S.C. § 2732; § 8202 (Title VIII), codified at 43 U.S.C. § 1656(e).

30. "Substantial threat of such a discharge" is "any incident involving a vessel that may create a significant risk of discharge of cargo oil. Such incidents include, but are not limited to groundings, stranding, collisions, hull damage, fire, explosion, loss of propulsion, flooding, on-deck spills, or other similar occurrences." 33 C.F.R. § 155.1020.

31. "Act" means "Title I of the Oil Pollution Act of 1990 (Pub. L. 101-380; 33 U.S.C. 2701 through 2719)." 33 C.F.R. § 136.5(b).

Pet. App. C at 81a-82a (emphasis in original) (footnotes omitted).

Judge Graber was precisely on target when recapitulating the legislative history as follows:

> In summary, before Congress held its Conference Committee, the Senate had a bill with: (a) a preemption clause in its oil pollution liability and compensation title (Title I, § 106); and (b) some oil spill prevention provisions in Title III, which had their own specific preemption provision (§ 310). The House, where most of Title IV originated, had only one preemption provision (§ 1018), which was similar to the Senate's § 106 and which the House intended to apply only to oil spill liability and compensation.
>
> * * *
>
> The Conference Committee's deletion of the only preemption clause that applied specifically to oil spill prevention, and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of § 1018 to apply to OPA 90's oil spill prevention provisions (Title IV).

Pet. App. C at 87a-88a (footnote omitted); *see also National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1448 (E.D. Va. 1996).

A. Section 1018 Rationalized And Consolidated A Number Of Similar Non-preemption Clauses That Governed Liability And Compensation. None Of These Provisions Permitted On-Board Vessel Regulation

Predecessors to section 1018 include the Trans-Alaska Pipeline Authorization Act ("TAPAA") (43 U.S.C. § 1653(c)(9)), the Outer Continental Shelf Lands Act ("OSCLA") (43 U.S.C. § 1820(c)), the Deepwater Port Act

("DPA") (33 U.S.C. § 1517(k)(1)) and the Federal Water Pollution Control Act ("FWPCA") (33 U.S.C. § 1321(o)(2)). These provisions addressed liability and compensation for discharges. Section 1018 is no different.

The repeal by OPA of all but one of these close analogs to section 1018 supports Intertanko's position that section 1018 was a carry-forward and consolidation of non-preemption statutes that had applied to maritime oil spill liability regimes.

The only pre-existing non-preemption provision to survive OPA 90 was section 1321(o)(2) of the FWPCA. This section is almost identical to section 1018 of OPA:

> [n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirements or liabilities with respect to the discharge of oil or hazardous substance into any waters within such State, *or with respect to any removal activities related to such discharge*.

33 U.S.C. § 1321(o)(2) (emphasis added). The emphasized section was added by OPA in (OPA section 4202).

These very similar savings clauses from other statutes, by context and by direct language, have always been limited to maritime liability and compensation in the aftermath of a discharge. The liability and compensation provisions of the TAPAA, DPA, OCSLA and FWPCA preserved the ability of states to impose their own liability requirements. There is no reason to find that section 1018 had any greater impact.

B. The Conference Report Accompanying Opa Expressly Protects And Preserves This Court's Holding In *Ray v. ARCO* And Contradicts The Lower Courts' Broad Reading Of Section 1018

The Conference Report to the final version of OPA 90 expressly contradicts the expansive non-preemptive reading of section 1018 embraced by the lower courts. Nowhere in

the Title I section of the Conference Report is the term "prevention" used. Nowhere is there any mention of a state being permitted to impose on-board safety requirements for vessels. Nowhere is the PWSA mentioned in the context of non-preemption nor is there any hint that Title I's topics go beyond liability, compensation, discharges, removal, penalties and funding. The Conference report discussed both the Senate and House versions of the bill/Act:

> Both provisions preserve the authority of any State to establish or *maintain funds* for cleanup or compensation purposes and to *collect any fees or penalties imposed* under State law. Both provisions also authorize States to enforce the *financial responsibility requirements of this Act on their own navigable waters*. . . .
>
> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or any State or local government to impose *additional liability or requirements, or to determine the amount of, any civil penalty for any violation of law*. . . .
>
> The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) (emphasis added).

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. at 121-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 799-800.

The Conference Report conforms the statute with the prior case law of this Court. Congress preserved state authority to impose liabilities, fines, or penalties for discharges occurring in state waters. States are not barred from imposing "additional liability or requirements" with respect to the "discharge of oil," "other pollution by oil," or "removal activities" connected to discharges, requirements

states were permitted to impose prior to OPA 90. Section 1018, however, does not cede to a state the authority to impose additional safety requirements on federally or internationally certified vessels operating normally in the course of their business in interstate and foreign commerce.

The significance of the Conference Report's approving and protective view of the Court's holding in *Ray v. ARCO* cannot be understated. Congress did not intend to alter existing law or relationships between the federal and state governments on matters of marine safety such as those in dispute in *Ray* or here. A rational reading of the Conference Report Language on the continuing vitality of *Ray* and the plain language of section 1018 yields a restatement of the proposition that states are, and remain, free to regulate with respect to liability and compensation for oil pollution and removal activities relating to a discharge of oil in state waters, but regulations which purport to regulate on-board marine safety requirements, such as those found in Title II of the PWSA (the focus of the *Ray* decision) remain preempted by Federal law.

CONCLUSION

Petitioner Intertanko respectfully petitions this Court to find that federal statutes, regulations and international agreements to which the United States has acceded operate to oust state and local governments from imposing differing standards and requirements governing vessel operations, personnel qualifications and training on vessels subject to federal requirements. The decision of the Court of Appeals, to the extent it upheld Washington State regulations affecting operations and personnel of tank vessels in the interstate and foreign commerce of the United States, should be reversed.

Respectfully submitted,

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